

87-5170 JOHN C. McCULLOCH
v.
UNITED STATES

87-5266 JERRY HERBERT JONES
v.
UNITED STATES

Nos. 87-5170 AND 87-5266. Decided November 9, 1987

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Subsequently, in *Dowling v. United States*, 473 U. S. 207 (1985), this Court held that criminal penalties could not be imposed for interstate transportation of pirated tapes under 18 U. S. C. § 2314. As a result, petitioners initiated this action, pursuant to 28 U. S. C. § 2255, to have their convictions set aside. The district court vacated the convictions under § 2314, but refused to alter petitioners' convictions for wire fraud or the RICO violations. *Cooper v. United States*,

639 F. Supp. 176 (M. D. Fla. 1986). The Court of Appeals affirmed in a judgment order, relying on the district court's opinion. App. to Petn. 87-5170 A-2.

These petitions present the question of whether a RICO conviction may stand when some—but not all—of a defendant's convictions for the predicate acts which are the basis of his RICO conviction are vacated. Here, the district court vacated six of petitioner McCulloch's eleven predicate-act convictions, and six of petitioner Jones' fourteen convictions. *Cooper, supra*, 639 F. Supp., at 187. The jury's verdict on the RICO counts did not indicate which of these various predicate acts formed the basis on which it found "a pattern of racketeering activity." 18 U. S. C. § 1962(c). The district court allowed the RICO convictions to stand.

The courts below followed a prior decision of the Fifth Circuit, *United States v. Peacock*, 654 F. 2d 339 (CA5 1981), cert. denied, 464 U. S. 965 (1983). There, the Fifth Circuit vacated several convictions for predicate acts committed by three RICO defendants, but concluded that where "each of the appellants [was properly] convicted of at least two racketeering acts which were related to the . . . enterprise," their RICO convictions remained valid. *Peacock, supra*, 654 F. 2d, at 248. The Fifth Circuit recognized that this holding was in conflict with an opposing conclusion reached in *United States v. Brown*, 583 F. 2d 659 (CA3 1978), cert. denied, 440 U. S. 909 (1979), where the Third Circuit reversed two defendants' RICO convictions when two of their four convictions for predicate acts were found to be invalid. *Brown, supra*, 583 F. 2d, at 669. The Seventh and the Ninth Circuits have recognized this conflict, but have declined to adopt either position to date. See *United States v. Anderson*, 809 F. 2d 1281, 1284-1285 (CA7 1987); *United States v. Lopez*, 803 F. 2d 969, 976 (CA9 1986), cert. denied, — U. S. — (1987).

Because of the disagreement and uncertainty among the Courts of Appeals over the proper application of this impor-

tant federal criminal statute, I would grant certiorari to resolve the conflict.